CASES AT LAW

DECIDED AT THE

EXTRA TERM

*COMMENCING ON 26 OCTOBER, 1864

JOSEPH McDANIEL v. TRULL.

(2 Winst., 1.)

A substitute never liable to conscription, being over 50 years of age, is not discharged from the service by the conscription of his principal under the act of Congress of 4 January, 1864.

The nature and facts of the case are stated in the opinion of the Court.

Winston, Sr., for Trull.
No counsel in this Court for petitioner.

MANLY, J. The case before us is brought into this Court by writ of *certiorari* from the judgment of the Chief Justice at chambers, his judgment having been pronounced *pro forma,* that it might be reviewed in this Court at this term. The case involves the question whether a substitute, taken into the military service of the Confederate States under the act of April, 1862, was entitled to a discharge upon the conscription of his principal, after the passage of the act of 5 Jan- (400) uary, 1864.

It seems the substitute was not bound under any act of Congress to do service on his own account (being past 50 years of age), so that the question is freed from complication; and is simply whether the act of the Government, calling back into the service the principal, puts an end to the substitute's term of service. We think it does not.

As we had occasion to say at the last regular term of this Court, in *Gatlin v. Walton, ante,* 325, with the special agreement of the parties in a case of substitution, with the considerations and motives actuating them, the Confederate States have had nothing to do. They acquiesced in the arrangement of the parties so far as to accept one man instead of another, in compliance with what was supposed to be their mutual wish and convenience; and in respect to the Confederate States, the substitute stands, therefore, in the light of a volunteer for the term of service to which the principal was subject; and such being the case, there is

*This term was appointed by the Chief Justice under the act of the General Assembly passed at the adjourned session of 1864, chapter 5.

no principle we are aware of to exempt him from the performance of the full term of that service, by reason of any action of the Government which may affect the rights of his principal under their private agreement.

There is a manifest intention on the part of the Congress to retain the substitute in the service; and I take it there can be no question that Congress had the power to do so specifically, without any general legislation to cover their case. No provision is made for their discharge in the act of January, 1864, but they are left in the condition in which they were found—volunteers for the war.

(401) What seems to us conclusive evidence of this purpose of the Congress to continue them in the service is found in the act itself. It declares: "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms, the Congress of the Confederate States do enact, that no person shall be exempt from military service by reason of his having furnished a substitute; but this act shall not be so construed as to affect persons who, though not liable to render military service, nevertheless furnished substitutes." From this we learn two things clearly: (1) that the Confederate States were in need of soldiers in the field; and (2) that they expected to get them by calling back into the service the men who had theretofore put in substitutes. The object of the act was to secure an addition to the military force. Now, this object would be entirely frustrated if one man was to be let out for every one taken in, which would be the case (proximately at least) if substitutes are entitled to a discharge.

It is perfectly clear, therefore, that Congress intended no such thing. The implication to the contrary is as forcible as if they had declared it in words.

A military force in some form constitutes, amongst all people, a part of the organism which we call government, being a portion of the executive branch; and such a force, when once constituted, is manifestly intended for an indefinite term of service, unless there be something in the organic law to define and limit it. Such limitation in the case before us can be found only in the general provision of law relating to the army, to which the petitioner belongs, defining its term of service to be for the war. A sense of interest, as well as justice, will induce the Government, through its proper agents, to listen to all applications for relief on account of disability, or arising from time to time, and to these the soldier must resort.

(402) The judgment at chambers is therefore reversed, and a judgment rendered in this Court that the petitioner, Joseph McDaniel, is rightfully in the custody of the military authorities, and must so continue.

TOBIAS KESLER v. JOHN M. BRAWLEY.

(2 Winst., 4.)

A conscript who was between 45 and 50 years old when he was enrolled under the act of Congress of 17 February, 1864, is entitled to his discharge when he becomes 50 years of age.

MANLY, J., dissenting.

THIS was a writ of *certiorari* from this Court, sued out by Captain Brawley, in order to review the decision of *Chief Justice Pearson* on a writ of *habeas corpus,* at the suit of Tobias Kesler against John M. Brawley, a captain in the army of the Confederate States, complaining of being illegally restrained of his liberty by Captain Brawley. It appeared on the trial before the Chief Justice that the petitioner had been enrolled under the act of Congress of 17 February, 1864, as one of the senior reserves, he being then between the ages of 45 and 50, and that he became 50 years old on.....October, 1864, and he was discharged.

Blackner for petitioner.
Winston, Sr., for Brawley.

PEARSON, C. J. "From and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war." Act of Congress, 17 February, 1864, sec. 1.

One of two constructions must be adopted: (1) It applies to *individuals* who are, at the date of the passage of the act, between the ages of 17 and 50, as *descriptio personarum,* the same, in legal effect, as if the persons answering the description were named, and puts them in the military service "for (that is, during) the war." This mean- (403) ing can be given by adding the words "who are now," so as to make it read: "All white men, residents of the Confederate States, *who are now* between the ages of 17 and 50, shall be in the service of the Confederate States for (that is, during) the war. This act shall take effect from and after its passage." According to this construction, all white men who are, at the date of the passage of the act, under the age of 50 would be liable to military service during the war, notwithstanding they afterwards arrive at that age, because they are embraced by the description; and all white men who are, at the date of the passage of the act, under the age of 17 would not be liable to military service, because they do not answer the description. So that, if this construction be adopted, and judgment is therefore rendered against the petitioner, the courts and judges will be bound, as a matter of course, upon the au-

thority of this decision, to discharge every one who has been, or may be, put in the military service who was not, at the passage of the act, 17 years of age.

There are two fatal objections to this construction: (1) In order to express the meaning, it is necessary to add words which are not found in the act, and the addition of which varies the sense *materially*. This is not authorized by any rule of construction. (2) According to the whole scope and tenor of the act, one of its main objects is to bring into the military service the young men who are continuously arriving at the age of 17; and the purpose is not only to embrace those who are 17 at the passage of the act, but all who shall thereafter arrive at that age; which purpose would be defeated by this construction, and it can only be contended for on the ground of an oversight, or *casus omissus* in framing the act, which, in so important a matter, the Court is not at liberty to assume.

(404) The second construction is that the section applies to a class composed of all white men between the ages of 17 and 50, without regard to the time when they may be between those ages, and puts them into military service as *a class* for (that is, during) the war. This meaning can be given simply by changing the position of the words "for the war," so as to make the section read, "for (that is, during) the war, all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States." "This act shall take effect from and after its passage." The Court is authorized, by a well-settled rule of construction, to change the position of words. See Dwarris on Statutes.

Indeed, this change in the position of words in this instance is only for the purpose of making the sense clearer. For if persons are conscripted *as a class,* it follows, of course, that they cease to be liable when they pass out of the class, and become liable when they enter the class. When no time is fixed at which they are to be between the ages designated, the conscription is necessarily as a class; the distinction being, when a time is fixed the conscription is as *individuals, descriptio personarum*. When no time is fixed, the conscription is as a class. Here the time is fixed; so the conscription is not as a class, and that consequence follows without reference to the position of the words "for (that is, during) the war," although it makes the sense clearer to put the words at the beginning of the section, instead of at the end. "For the war" is evidently used in the sense of "during the war," and conceding that the conscription is by a class, if the words "for (that is, during) the war" had been placed at the beginning of the section, the fact that a "senior reserve" would not be liable after arriving at the age of 50 is too plain for discussion; and it would be strange if the result can be different

from the circumstance that the words, "for (that is, during) the (405) war," happen to be at the end of the section. These words have no reference to the *time of service;* that is fixed by conscription *as a class,* and the words are manifestly used to enact that the intended conscription of *all* between the ages of 17 and 50 should continue, or be in force, during the war.

According to this construction, all persons under the age of 17, for the time to come, on arriving at that age, enter into the class, and are liable to military service; and all persons under the age of 50, from time to time, on arriving at that age, pass out of the class, and are no longer liable to military service; the rule working both ways unless some provision be made to the contrary.

It may be objected to this construction that it lets out of the military service all who arrive at the age of 50. The reply is, there is nothing in the act tending to show that it was not the intention to let men, who were over 45 when conscripted, go out of the service on arriving at the age of 50; and there is reason to suppose such was the intention, on the idea that heads of families, after arriving at the age of 50, would be of more use to the country at home than if they are kept in the military service as *senior reserves.* But assume this not to be so, and that this construction also supposes a *casus omissus,* how does it compare with the *casus omissus* implied by the first construction? *This* lets out of the *senior reserves* a few old men, comparatively speaking, while *that* fails to take in a large body of young men, who are looked to as the main resources of the country for future military operations in the *regular army!* By reference to the census statistics, the number of young men arriving at the age of 17 in the course of a year, in proportion to old men arriving at the age of 50, is about fifteen to one. From this it may be seen how much the public service will lose by adopting the first construction and rejecting the second; and of course if a *casus omissus* is to be applied in both constructions, that should be supposed (406) which is of least consequence, and is the most likely to have occurred. The Court is of opinion that the second is the proper construction.

The perusal of the whole act will tend to support this construction. Mr. Winston, who argued for the Government, referred to section 5 as tending to support the first construction. It seems to us that this section sustains the conclusion to which we have arrived. The provision that persons failing to enroll themselves at the time required "shall be placed in the service in the field, *for the war,* in the same manner as though they were between the ages of 18 and 45," is imposed as a penalty on such as were recusant; in respect to whom the term of service is fixed, and excludes the idea of a general liability of all to *serve for the war.*

The suggestion of the learned counsel, that the proviso in this section that the persons mentioned shall constitute a reserve for State defenses, etc., should be modified by adding the words, "except those who fail to enroll themselves," has nothing to support it.

Our conclusion is also strengthened by reference to the other conscription acts. The act of April, 1862, conscripts, *as a class,* for three years or the war. The act of September, 1862, conscripts, *as a class,* for three years or the war, and the effect of *passing out of this class,* to relieve from further liability to service, is prevented by a proviso, *"when once enrolled, all persons between the ages of 18 and 45 shall serve the full time."* This proviso was necessary to show an intention that, although the conscription was as a class, still, in respect to persons who should, after being enrolled, arrive at the age of 45, it was deemed important to retain them in service for the full time. The act under consideration in like manner conscripts for (that is, during) the war as a class, (407) those between the ages of 17 and 50. There is no proviso to continue in the service those who arrive at the age of 50 and pass out of the class. Whether a proviso to prevent this effect was left out on purpose, because it was not deemed expedient to keep senior reserves in service after they became 50 years of age, or was an oversight, we have no means of deciding. Our duty is to expound the law according to the sense of the words used by the lawmakers; and, in the absence of a proviso to the contrary, it follows, of course, that when a "senior reserve" arrives at the age of 50, he passes out of the class, and is no longer liable to military service.

There is no error in the judgment below.

BATTLE, J., concurring, there was judgment for the petitioner.

MANLY, J., dissenting: Not concurring in the opinion of a majority of the Court, I will state briefly the reasons of my nonconcurrence.

The military bill of February, 1864, under which the service of the petitioner is claimed, prescribes the term of service *"for the war"* too plainly and positively to admit of abridgment by implications in favor of any persons embraced within its provisions.

The part of the bill directly bearing upon the question is the first section, and is in the following words: "That from and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war."

Here, manifestly, all persons between the ages of 17 and 50 are declared to belong to the military forces of the country, for the war. That the Congress in this conscription of persons was regarding them as a

class seems to be probable. A proper *exegesis* of the statute, according to the view which I take of it, requires this concession. But it does not follow that a continuous application of the law to the (408) class would enlarge or let out any one embraced within its folds. The obligation to service under it is not during their continuance in the class, but *during the war.*

A prescribed age is an anomalous and novel limitation to military service; for a term of years, for the year, or for an expedition, is more usual and convenient. In our country, where there is no provision for keeping a register of births, and where, consequently, these records are very irregularly kept, and in most cases soon lost or destroyed, there is no fact more liable to controversy, and which may be affected by a greater variety of proof, than the age of a person. How are questions of age to be determined? It will not do to make them depend upon the allegations of soldiers or the will of the commanders; and it follows that some tribunal must be established and set daily to adjudicate cases as they arise. In the beginning, when enrolling men for service, where time and opportunity are afforded for investigation, questions of age are found sufficiently vexatious and troublesome. In the midst of campaigns such investigations would be utterly impracticable.

My inference is that Congress could not have intended to prescribe such a limit to the service of the senior reserves, and I think it did not.

The true and reasonable interpretation of the law, then, is that it places in the military service of the Confederate States all persons within the prescribed ages, *for the war.* There is no other interpretation which will give the ordinary signification to the words used. And as the intention of this as well as other laws on the subject is to raise an army for full and complete service in the field, it is believed to be within the purview of the law that from time to time, as the junior reserves arrive at the age of 18, they may be conscribed for general service. When once so conscripted and classed, there is no provision of the law, and no rule of the military service, I take it, whereby they become entitled at any time to be discharged except for disability. (409)

The fifth section of the bill (17 February) has been referred to as throwing some light on the question before us. I perceive but little in it to aid us. It seems to be an instance, not unfrequently occurring in legislation, where a proviso is made to emasculate completely the section or part of the law to which it is appended. This is all.

In the law of 10 April, 1862, authorizing the President to call into service persons between the ages of 18 and 35, it is provided that the President may call those thereafter arriving at 18, and when called, all should serve their full term. The two acts, that of April, 1862, and the one now before us, have accomplished, in my judgment, the same objects

by different words. The same necessities were upon the country, and it is proper to presume that similar provisions of law were intended to be made to meet them. The two laws were probably constructed by different minds, and hence the difference of language. The intent seems to have been the same, and the comprehensive and forcible words used in the act of February last sufficiently declare such intent.

The words, *"for the war,"* or any similar words in any other connection in the section, might be of ambiguous import. But in *the connection in which they stand* they prescribe a *term of service,* as already stated, too plainly to be mistaken, and which I do not feel at liberty to abridge, from anything which I find of apparent inconsistency in the law or from any considerations of public policy.

My opinion is that the petitioner is rightfully under the control of the military authorities, and is not entitled to be discharged.

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(410)

WILLIAM D. JOHNSON v. PETER MALLETT.

(2 Winst., 13.)

1. The Congress of the Confederate States have no power to exact military service from a State officer.
2. A policeman of an incorporated town is, as a State officer, exempt from conscription.
3. The Constitution and laws of this State determine, conclusively and exclusively, what offices are necessary for the administration of its government.
4. The certificate of the Governor is not required to entitle a State officer to exemption from conscription.

THE nature and facts of this case are stated in *Judge Battle's* opinion.

Fowle for Johnson, petitioner.
Bragg for Mallett.

BATTLE, J. The petitioner claims to be exempt from military service in the army of the Confederate States upon the ground that he is a policeman of the city of Raleigh. His claim is resisted in the return of the defendant upon the allegation that the petitioner is not a policeman, but only a contractor to keep the city pumps in order.

The testimony of the mayor of the city, together with the other proofs taken and filed in the cause, satisfy us that the petitioner is one of the city police, though, in addition to his duties as such, he has had assigned

to him the charge of keeping the pumps in repair. Upon the facts thus appearing from the pleadings and proofs, the question arises whether the petitioner is entitled to exemption from conscription. This is a question of law, and it is our duty now to proceed to its consideration.

It is now generally if not universally conceded that the Con- (411) federate Congress have no power to order the conscription of State officers. The principle is well expressed by the Supreme Court of Appeals of Virginia, in the opinion given in the case of *Burroughs v. Peyton,* 16 Gratt., 470, and we express our full concurrence in it. "The State governments are an essential part of our political system, for upon the separate and independent sovereignty of the States the foundation of our confederation rests. All powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the State, are reserved to States respectively, or to the people thereof"; and the Confederate States guarantee to each State a republican form of government.

It is absurd to suppose that the Government of the Confederate States can rightfully destroy the States which created it; and all the powers conferred on it must be understood to have been given with the limitation that in exercising them nothing shall be done to interfere with the independent exercise of its sovereign powers by each State. Congress can have no right, therefore, to deprive a State of the services of any officer necessary to the action of its government; and the State itself is the sole judge as to the officers that are necessary for that purpose.

We are not aware that the Confederate Congress have ever set up claim to the exercise of a power inconsistent with this fundamental principle of State sovereignty. On the contrary, in all the acts it has passed granting exemptions from conscription it has expressly mentioned, in some form or other, State officers as being entitled to exemption. Thus, in the act of 21 April, 1862, "all judicial and executive officers of State governments" are exempted. In the act of 11 October, 1862, which repeals that of April, the officers, judicial and executive, of the State governments are again declared to be exempted. The act of 1 May, 1863, provides that in addition to the State officers exempted by (412) the act of 11 October, 1862, there "shall be exempted all State officers whom the Governor of any State may claim to have exempted for the due administration of the government and laws thereof; but this exemption shall not continue in any State after the adjournment of the next regular session of its Legislature, unless such Legislature shall by law exempt them from service in the provisional army of the Confederate States."

It is unnecessary to consider the effect of these exemption acts, because they are all repealed by the act of 17 February, 1864, and State officers were exempted in the following terms: "The members of the

several State Legislatures and such other State officers as the Governors of the respective States may certify to be necessary for the proper administration of the State Government." If the petitioner be a State officer, and had he produced any such certificate in his behalf from the Governor of this State, we must presume that the Confederate officers would have admitted it, and have exempted him accordingly; but he has failed to produce any such certificate, and yet he insists, nevertheless, that his right to exemption is established by the action of our General Assembly. That body, by an act ratified 14 Decmeber, 1863, mentions several officers as "necessary to carry on the operations of the State Government," for whom claims had been made and obtained under the act of Congress of May, 1863, and then itself claims and exempts them from conscription. Among the officers thus claimed to be exempt are the "mayor and police of Raleigh." See laws of extra session in December, 1863, ch. 14. That same body, at its extra session in May, 1864, by a resolution ratified 28 May, "demands" the exemption of the same, together with some other officers, prefacing it with a preamble declaring

"that the fearless and free discharge of the officers of the State is
(413) essential to the preservation of its sovereignty," and that "Congress has no power to conscript State officers."

Has the Legislature of the State the right to "demand" these exemptions? It is very decidedly our opinion that it has, and that it has to the exclusion of every other department of the State Government. It is clear beyond all question that, within the limits of the written Constitution which the people of the State have imposed on the Government, the legislative power is the supreme power in the State. Among its vast powers of legislation, which are unlimited and unrestricted except by the Constitution, is that of ascertaining what officers, in addition to those specified in the Constitution, are necessary for the efficient management of the affairs of the State, and then of appointing the officers and prescribing their duties. The powers of the other two great departments of Government are very different. To the judiciary is assigned the power of expounding the Constitution and laws, while the Executive has, solely, the power to enforce their faithful execution. From this, as it seems to us, it follows as a logical sequence that when it is shown that each State is the sole judge as to the officers who are necessary to the action of its government, its Legislature, and its Legislature alone, is the organ by which its judgment is to be ascertained and made known. It may well be that the *Legislature* can select and appoint the Governor as its agent to certify its decision, but we are unable to find, among the powers given to the *Confederate Government,* any authority to confer upon the Governor of the State the power to decide, and then to certify his decision, as to who are the necessary State officers.

The conclusion to which this course of reasoning leads us is (414) that the petitioner is entitled to his discharge, provided he is such an officer as the Legislature has the power to exempt as being necessary in the administration of the laws of the State. *Police* are defined by Webster to be "a body of civil officers, especially in cities, for enforcing laws within their chartered limits must be a matter of great importance parts, of the organization of the State; hence the enforcement of the laws within their chartered limits must be a matter of great importance to the weal of the State itself. It follows, as a necessary consequence, that the police of all the larger towns, and especially of the capital of a State, must be deemed essential to the full, complete, and beneficial action of the State Government.

The conclusion is that there is no error in the judgment rendered by the court below.

Judgment for the petitioner.

PEARSON, C. J. I concur fully in the decision of this case, for these reasons:

1. What officers are necessary and proper for the administration of the Government and laws of the State is a matter confided to the wisdom of the Legislature by the Constitution of the State, except in respect to the offices created or recognized by that instrument itself. Whenever the Legislature creates and fills an office, or authorizes a county or municipal corporation to do so, it is to be taken *conclusively* as a "presumption of law" that such office is necessary and proper; for otherwise the *folly* of creating and continuing an useless office is imputed to the Legislature.

2. The Governor, members of the Legislature, judges, and other officers of the State, are not *liable to conscription,* by the force and effect of the Constitution and of our form of government, and stand in no need of being exempted, either by an act of Congress, or the certificate and claim of the Governor, or an act of the Legislature; for the power to conscript is restricted by the condition that it does not include officers of the State; otherwise, the *existence* of the *creator* would (415) be made to depend on the will of the creature.

So that part of the act of Congress which enumerates among the persons exempted "the members of the several State Legislatures and such other State officers as the Governors of the respective States may certify to be necessary for the proper administration of the State governments" (act of 17 February, 1864, sec. 10, clause 2) is a matter of supererogation. The certificate of the Governor, there required, has no legal effect. And the resolution of the State Legislature which demands the exemption of State officers is, in effect, a protest by that body against the right

asserted on the part of Congress to conscript officers of the State by enumerating them among the persons whom, in its wisdom, it deemed expedient to exempt.

Cited: *Wood v. Bradshaw, post,* 434; *Bridgman v. Mallett, post,* 507, 508.